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No. 10-439

In The Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL-ODAH, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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Model Code of Evidence ch. VI, introductory cmt. (1942) 7

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STATEMENT OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a national membership of more than 12,800 members, including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges, as well as an additional 35,000 state, local, and international affiliate members. The American Bar Association recognizes the NACDL as one of its affiliated organizations and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases, both civilian and military. Among the NACDL's objectives are to ensure due process for persons accused of crimes or other misconduct and to promote the fair administration of justice. To this end, the NACDL is a frequent participant in matters pending before this Court, including cases arising in

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[1] The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least ten days prior to the due date of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief.

the national security context. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008).

The NACDL's interest in supporting this petition for certiorari is two-fold. First, the membership of the NACDL has a strong interest in ensuring that courts apply the standards set forth in the Federal Rules of Evidence whenever those Rules are, by their terms, applicable, and in maintaining the integrity of the rules governing the admissibility of hearsay in particular. Indeed, as set forth below, criminal defense lawyers have relied on these hearsay rules for centuries as a vital tool to ensure that persons facing significant liberty deprivations receive the benefits of meaningful adversarial testing of the prosecution's evidence against them and, ultimately, just verdicts and reliable judgments. Second, the NACDL has a strong interest in preserving meaningful habeas review, which "the Framers considered . . . a vital instrument for the protection of individual liberty." *Boumediene*, 533 U.S. at 743. That review includes the adversarial testing of disputed facts, in accordance with the Rules of Evidence and the provisions of the habeas statute itself.

In concluding that all hearsay was categorically admissible in certain habeas proceedings, the Court of Appeals ignored the clear language of the Federal Rules of Evidence which are, as a matter of congressional mandate, applicable in these habeas proceedings. Further, by requiring district courts to admit hearsay, subject only to their standardless discretion to weigh its probative quality, the Court of Appeals

undermined the reliability, consistency, and predictability of habeas review. The consequences of this ruling are far-reaching, drawing the integrity of all detention hearings – and indeed all habeas proceedings – into question. For these reasons, the NACDL urges this Court to grant the petition for certiorari and bring clarity and uniformity to this now-troubled area of law.

SUMMARY OF ARGUMENT

Our adversarial system of justice rests upon the principle that cross-examination is a necessary tool for the testing of evidence. For centuries, courts have recognized that because hearsay cannot be tested through cross-examination, its use undermines the fairness and reliability of adversarial proceedings. As a result, courts have long applied the rule that hearsay is generally inadmissible in civil and criminal proceedings, absent certain established exceptions or exclusions. The Federal Rules of Evidence embrace this common-law framework, and reflect a careful balancing by Congress of the value of admitting relevant evidence on the one hand, and the need to exclude evidence that lacks reliability and legitimacy on the other.

While the Court of Appeals sought to carve out a special rule for certain habeas petitions, no such exception is warranted by either the text of the Rules or the longstanding policies that underlie the hearsay

prohibition. The hearsay provisions in the Federal Rules of Evidence expressly apply to habeas proceedings, subject to certain procedural protections provided by statute. Nor is the need for clear standards governing the admissibility of evidence any less pronounced in habeas cases in general or in those involving Guantánamo detainees in particular. Indeed, the application of the hearsay rules are particularly important in national security cases because the hearsay sought to be admitted – often the statements of other detainees – is often inherently unreliable, at least in part because many such statements involve double or triple hearsay and were frequently obtained through coercive interrogation techniques or even torture.

The application of the Federal Rules of Evidence in these cases would not unduly hamstring the government. To the contrary, the exceptions to the hearsay rule allow the government and habeas Petitioners alike to introduce those proofs which are deemed reliable, while subjecting that which ought to be subjected to adversarial testing to appropriate cross-examination. Moreover, the government, habeas Petitioners, and the very legitimacy of habeas proceedings themselves all benefit from the application of the clear standards of the Federal Rules of Evidence and the decades of case law interpreting them.

This petition for certiorari raises critical issues regarding the general applicability of the hearsay rules and, indeed, the Federal Rules of Evidence as a whole. It also raises significant questions regarding

the process applicable to habeas proceedings in general and to those involving Guantánamo detainees in particular. This Court should grant the petition of certiorari to reaffirm the applicability of the hearsay rules to all habeas proceedings, and to assure that such proceedings, given their critical importance to our system of justice, are characterized by meaningful, reliable, and fair adversarial process.

ARGUMENT

I. THE HEARSAY FRAMEWORK IN THE FEDERAL RULES OF EVIDENCE REFLECTS CAREFUL POLICY JUDGMENTS ROOTED IN THE IMPORTANCE OF CROSS-EXAMINATION IN THE ANGLO-AMERICAN ADVERSARIAL TRADITION

The rule against hearsay is rooted in the Anglo-American reliance on an adversarial system of justice, in which cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Because hearsay cannot be tested through cross-examination, its use can call into question the fairness and reliability of adversarial proceedings. For this reason, both England and the United States historically recognized a general rule that hearsay should be excluded from court proceedings, subject to established exceptions. In enacting the Federal Rules of Evidence, Congress endorsed and adopted this common-law framework. These

Rules reflect a careful balancing by Congress, as well as by the Supreme Court and the Federal Rules of Evidence Advisory Committee, between the importance of admitting potentially relevant evidence and the need to ensure its reliability and legitimacy, including in the context of habeas proceedings. This balancing should not be upended without congressional action.

A. Both the Common Law and the Federal Rules of Evidence Reflect the Policy Judgment that Restricting Hearsay is Necessary to Ensure the Fairness and Reliability of Judicial Proceedings

Under both the common law and the Federal Rules of Evidence courts have long barred the admissibility of hearsay, unless subject to an established exception, because of the importance of cross-examination as a means of testing the reliability of evidence. Indeed, objections to the use of hearsay were documented in England as early as the sixteenth century. *See* 5 John Henry Wigmore, Evidence § 1364 (Chadbourn rev. 1974) ("[I]t was discussed in Queen Mary's reign (1553), whether, of the two accusers required in treason, one could satisfy by reporting hearsay."). By the end of the eighteenth century the modern law of hearsay was firmly established in England, with most of the common-law exceptions already in place. *See* T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 Iowa L. Rev. 499, 533-37 & nn.263-72 (1999) (citing cases).

Legal historians have identified two key developments that contributed to the emergence of the hearsay rule and its exceptions. First, by the seventeenth century, the role of the fact-finder in judicial proceedings in England had changed from an inquisitorial model, in which fact-finders were permitted to conduct independent investigations, to a model in which fact-finders were limited to the consideration of evidence that was presented to them at trial. *See* 5 Wigmore, *supra*, § 1364; *see also* Model Code of Evidence ch. VI, introductory cmt. (1942) ("As our system changed in character from investigative to adversary the rule rejecting hearsay and the rule making opportunity for cross-examination a requisite of admissibility developed side by side."). Second, the latter half of the eighteenth century saw a rapid rise in the use of lawyers in English criminal trials, whose principal role was to cross-examine witnesses.[2] *See* John H. Langbein, *The Historical Foundations of the Law of Evidence*, 96 Colum. L. Rev. 1168, 1197 (1996); Gallanis, *supra*, at 545. This "new spirit of adversarialism" in criminal trials led attorneys to focus on evidentiary objections, particularly regarding evidence that denied them the opportunity for cross examination. Gallanis, *supra*, at 551. Hearsay objections then quickly migrated to civil trials, as criminal

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[2] Although lawyers had been common in civil trials since the Middle Ages, cross-examination was a less-significant tool in civil trials – which also relied principally upon written evidence – than in criminal trials at the time the hearsay rules developed. Gallanis, *supra*, at 511-12, 545-46.

attorneys who also practiced in civil cases began raising these objections in civil trials as well. *Id.* at 549-51. As reflected in its history, the hearsay framework thus rests upon the theory "that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination." 5 Wigmore, *supra*, § 1420; *see also Dysart Peerage Case*, 6 App. Cas. 489, 503 (1881) (Lord Blackburn) ("In England hearsay evidence . . . as a general rule is not admissible at all.").

The courts of the United States likewise embraced the common-law hearsay framework in the late eighteenth and early nineteenth centuries, concluding that hearsay was generally not admissible, unless subject to an established exception. *See, e.g.*, *State v. Baynard*, 1 Del. Cas. 662, 1794 WL 184, at *1 (Del. O & T 1794) (hearsay is generally inadmissible but is subject to exceptions); *State v. Webb*, 2 N.C. (1 Hayw.) 103, 1794 WL 98 (N.C. Super. L. & Eq. 1794) (per curiam) (court refused to admit a deposition because "no man shall be prejudiced by evidence which he had not the liberty to cross examine"). These cases reflect the same policy concerns about the unreliability and unfairness of basing decisions on evidence not subject to cross-examination. For example, in *Queen v. Hepburn*, this Court explained the policy justifications for the general rule excluding hearsay, citing "[i]ts intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and

the frauds which might be practiced under its cover." 11 U.S. 290, 296 (1813) (Marshall, J.). This Court further warned against "lightly yielding to the introduction of fresh exceptions to an old and well established rule: the value of which is felt and acknowledged by all." *Id.* State courts also warned about the unacceptable "doubts and difficulties" that arise from relying upon hearsay evidence. *Coleman v. Southwick*, 9 Johns. 45, 50 (N.Y. 1812) (Kent, C.J.). Thus,

> A person who relates a hearsay, is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities: he intrenches [sic] himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author.

Id. (internal quotation marks omitted); *see also Marshall v. Chicago & Great E. Ry.*, 48 Ill. 475, 476 (1868) (Breese, C.J.); ("[Hearsay] statements are not subjected to the ordinary tests required by law for ascertaining their truth[.]"). Indeed, the same policy concerns about the importance of cross-examination underlie the Bill of Rights guarantee of the right of confrontation in criminal cases. *See Giles v. California*, 554 U.S. 353, 499 (2008) ("[I]t seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots.") (quoting *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (plurality)).

In the twentieth century, attempts in the United States to alter the common-law hearsay framework met with strong resistance. For instance, the Model Code of Evidence, promulgated by the American Law Institute in 1942, proposed to "work[ ] radical changes in the common law," by admitting hearsay whenever the declarant was either "unavailable as a witness" or "present and subject to cross-examination." Model Code of Evidence Rule 503 & cmt. a (1942). In part due to its radical reworking of the hearsay rules, however, the Model Code was soundly rejected and was not adopted in a single state. *See* Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 Mich. L. Rev. 51, 53 (1987).

By contrast, in enacting the Federal Rules of Evidence in 1975, Congress endorsed the common-law principle that hearsay should generally be inadmissible, subject to exceptions and exclusions based upon the judgment that certain forms of hearsay possess sufficient guarantees of trustworthiness for admissibility or are admissible for other policy reasons.[3] *See* Advisory Committee's Notes on Article VIII of the Fed. R. Evid. ("The approach to hearsay in the rules is that of the common law, *i.e.*, a general rule

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[3] Congress played an active role in adopting the Federal Rules of Evidence, statutorily prohibiting the Rules from taking effect without specific legislation, and, through its judicial committees, conducting a thorough review of the Rules and making amendments. *See* Eileen A. Scallen, *Interpreting the Federal Rules of Evidence*, 28 Loy. L.A. L. Rev. 1283, 1290 (1995).

excluding hearsay, with exceptions[.]").[4] The Rules provide that hearsay is generally inadmissible, subject to a series of exceptions and exclusions that closely track the common law while providing for certain modifications.[5] This framework applies in habeas proceedings as well, although as discussed *infra* in Part II, Congress provided for another means of admitting

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[4] This Court has recognized that the Advisory Committee's Notes are "a respected source of scholarly commentary," *Tome v. United States*, 513 U.S. 150, 160 (1985) (Kennedy, J., plurality); *see also id.* at 167 (Scalia, J., concurring) (notes are "persuasive scholarly commentaries"), and therefore are "particularly relevant in determining the meaning" of the Rules, *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 165-66 n.9 (1988). *Accord Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (recognizing writings of Reporter of Advisory Committee as persuasive authority regarding meaning of Rules). Here, the Advisory Committee's Notes are cited as persuasive indicators of the relationship between the Rules and common law, and the approach and intent of the Advisory Committee in drafting the Rules.

[5] Article VIII of the Federal Rules of Evidence provides a framework for hearsay evidence. Rule 801 defines hearsay and provides that certain prior statements by a witness and admissions by a party-opponent are not hearsay, while Rule 802 provides the general rule that hearsay is not admissible, except as provided by other Rules. Rule 803 sets forth exceptions that apply regardless of the availability of the hearsay declarant, and Rule 804 delineates exceptions that apply only where the hearsay declarant is unavailable to testify as a witness. Rule 807 describes the "residual exception" to the hearsay rule, providing for certain specific circumstances where hearsay might be admissible. Where a Federal Rule departs from the common-law hearsay exception, the Advisory Committee's Notes so disclose. *See, e.g.*, Advisory Committee's Notes on Fed. R. Evid. 804(b)(2) (1972 Proposed Rules) (exception for dying declarations is "expanded somewhat beyond its traditionally narrow limits").

hearsay in the habeas context, while continuing to endorse the principle that declarants should be subject to adversarial questioning.

Most fundamentally, the Rules endorse the common-law principle that the most reliable evidence is that adduced by live testimony, under oath, in the personal presence of the trier of fact, and subject to cross examination. *See id.* Of these conditions, cross examination is central, and is the "vital feature" of the Anglo-American system. *See id.* (quoting 5 Wigmore, *supra*, § 1367); *see also id.* ("[C]ross-examination is effective in exposing imperfections of perception, memory, and narration[.]") (citing Edmund M. Morgan, *Foreword* to Model Code of Evidence 37 (1942)).

Of course, exceptions and exclusions to the hearsay prohibition are also provided for under the Rules, but only when the evidence arises in circumstances that "furnish guarantees of trustworthiness" that would ordinarily be supplied by cross examination, *id.*, or when other policy reasons makes their admission appropriate. *See, e.g.*, Advisory Committee's Notes on Fed. R. Evid. 803 (1972 Proposed Rules) (Rule 803 "proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available"); Advisory Committee's Notes on Fed. R. Evid. 804(b)(1) (1972 Proposed Rules) (noting that former testimony given under oath and subject to cross-examination lacks only "one of the ideal conditions for the giving of

testimony," presence); Advisory Committee's Notes on Fed. R. Evid. 801(d) (1972 Proposed Rules) (Rule 801(d) excludes admissions by a party-opponent from the definition of hearsay "on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule"); Advisory Committee's Notes on Fed. R. Evid. 804(b)(6) (1997 Amendments) (forfeiture by wrongdoing exception "recognizes the need for a prophylactic rule to deal with abhorrent behavior which strikes at the heart of the system of justice itself" (internal quotation marks omitted)).

The importance or necessity of the evidence is, however, not alone sufficient justification for admitting hearsay, reflecting the judgment of Congress, the Supreme Court, and the Advisory Committee that some hearsay is inappropriate for consideration even under the most compelling circumstances. *See* Fed. R. Evid. 807 (a statement is admissible under the "residual exception" only if, *inter alia*, it has "equivalent circumstantial guarantees of trustworthiness" to statements admitted under Rule 803 or Rule 804); *see also Schering Corp. v. Pfizer Inc.*, 189 F.3d 218 (2d Cir. 1999) (Sotomayor, J.) ("[W]e have often admitted surveys that are relevant to prove material facts under the residual hearsay rule on the basis simply of their need *plus adequate guarantees of trustworthiness*." (emphasis added)).

B. The Federal Rules of Evidence Reflect a Careful Balancing Between the Value of Admitting Evidence and the Need to Ensure its Reliability and Legitimacy

As discussed above, the Rules of Evidence were not adopted casually. Rather, the Rules, including the hearsay rules, reflect a careful balancing by Congress, as well as the Supreme Court and the Advisory Committee, of the value of admitting relevant evidence on the one hand and the need to exclude evidence that lacks reliability and legitimacy on the other. Courts should not set aside these policy judgments in favor of a largely *ad hoc* process of evaluating hearsay evidence; ultimately, Congress's considered judgment must be respected.

The "residual exception" to the hearsay rule, currently codified in Rule 807,[6] exemplifies this careful balancing. The proposed rule submitted to Congress by the Supreme Court provided for a broad residual exception to the hearsay rule, admitting any hearsay statement found to have "comparable circumstantial guarantees of trustworthiness." However, the House of Representatives deleted this provision as injecting "too much uncertainty" into the law of evidence and impairing the ability of practitioners to prepare for trial. The Senate then proposed a rule of "much

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[6] In 1997, the contents of Rule 803(24) and Rule 804(b)(5) were combined and transferred to a new Rule 807. *See* Advisory Committee's Notes on Fed. R. Evid. 807 (1997 Amendments).

narrower scope," which was ultimately adopted, to ensure that the residual exception did not "emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules." Under this revised version, a court must determine that comparable circumstantial guarantees of trustworthiness exist as well as that the statement is offered as evidence that is "more probative" of a "material fact" than any other evidence obtainable by "reasonable efforts," and that admission will serve "the interests of justice." *See* Notes on Fed. R. Evid. 803 (1974 Enactment).

Similarly, the development of the business records exception to the hearsay rule demonstrates the congressional effort to strike the right balance. *See* Fed. R. Evid. 803(6). While the proposed rule submitted to Congress would have admitted records made "in the course of a regularly conducted activity," the House of Representatives amended the rule to be limited to business activities, expressing concern that "there were insufficient guarantees of reliability" in the proposed rule's broad definition; meanwhile, the Senate worried that the House's amendments would exclude school, church, and hospital records. The final rule provided that the records must be those of a regularly conducted business activity, but defined "business" to include institutions and associations. *See* Notes on Fed. R. Evid. 803(6) (1974 Enactment). Likewise, the proposed Rule 804(b)(2)'s exception for dying declarations would have extended the hearsay exception to all civil and criminal cases. However, the

House of Representatives "did not consider dying declarations as among the most reliable forms of hearsay," and therefore "amended the provision to limit their admissibility in criminal cases to homicide prosecutions, where exceptional need for the evidence is present." This amendment was ultimately adopted in the final Rule. Notes on Fed. R. Evid. 804(b)(2) (1974 Enactment).

Likewise, the Rules also modified common-law rules based on the policy judgments of Congress, as well as the Advisory Committee and the Supreme Court. For example, the Rules depart from the common law and now permit the admission of prior consistent statements of a witness as substantive evidence under a "gamesmanship" theory. *See* Advisory Committee's Notes on Fed. R. Evid. 801(d) (1972 Proposed Rules) ("[I]f the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.").

The hearsay framework codified by the Rules of Evidence has a long-established pedigree, firmly rooted in our adversarial system of justice, that reflects the principle that cross-examination is a critical tool for testing the reliability of evidence and is also embodied in the Confrontation Clause. Yet the Rules go beyond mere recitation of historical standards: they reflect carefully considered judgments of the Supreme Court, the Advisory Committee, and Congress, both that hearsay should be generally inadmissible, and that courts' authority to admit hearsay

should be subject to limited, clearly-stated rules. Creating wholesale exceptions for certain habeas proceedings without statutory support disregards this careful balancing.

II. THE ADMISSION OF HEARSAY EVIDENCE IN HABEAS CORPUS PROCEEDINGS TESTING THE LEGALITY OF DETENTION IS INCONSISTENT WITH THE PURPOSE AND IMPORTANCE OF THE WRIT AND THE RULES OF EVIDENCE

In determining that hearsay "is always admissible" in detainee habeas corpus proceedings, App. a12 (quoting *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010)), the lower courts in this case not only eschewed a rule deeply embedded in our common law and constitutional jurisprudence, but also abandoned a fundamental means by which our adversarial system ensures the reliability, fairness, and legitimacy of judicial proceedings. This was a critical error: habeas corpus is designed to "protect against the arbitrary exercise of governmental power," *Boumediene*, 533 U.S. at 794, and to serve as "a critical check on the Executive," *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004), and as a "stable bulwark of our liberties," William Blackstone, 1 Commentaries *137. Accepting hearsay evidence on a categorical basis in certain habeas proceedings undermines the very function of the Great Writ, drawing the integrity of detention proceedings – and indeed all habeas proceedings – into question.

A. Congress has Determined that the Rules of Evidence Apply in Habeas Corpus Proceedings

It has been said that "there is no higher duty than to maintain [the writ of habeas corpus] unimpaired." *Bowen v. Johnson*, 306 U.S. 19, 26 (1939); *see also Boumediene*, 533 U.S. at 739-42 (recounting Parliamentary attempts to secure the writ by statute from the Magna Carta through the Habeas Corpus Act of 1679). This lesson was understood by the Framers, who included protection for the privilege of habeas corpus in "a Constitution that, at the outset, had no Bill of Rights." *Id.* at 739.

Congress has continued to recognize the importance of habeas corpus as an instrument of individual liberty. One way it has done so is by assuring that the Rules of Evidence – including rules regarding hearsay – generally apply to habeas proceedings, Fed. R. Evid. 1101(e), subject only to the statutory provision that permits the consideration of affidavits, in the trial court's discretion, 28 U.S.C. § 2256. *Accord* Advisory Committee's Notes on Fed. R. Evid. 1101(d) (citing *Townsend v. Sain*, 372 U.S. 293, 311, 322 (1963) (recognizing necessity of trial-like procedures in habeas corpus actions)); *see also Greiner v. Wells*, 417 F.3d 305, 325-26 (2d Cir. 2005), *cert. denied*, 546 U.S. 1184 (2006) (excluding hearsay in a habeas case pursuant to Rules). Indeed, even the statutory exception for the use of affidavits in habeas proceedings provides for adversarial testing of the affiant, by providing parties with the right to

"propound written interrogatories to the affiants, or to file answering affidavits." 28 U.S.C. § 2246. In the context of habeas proceedings, then, Congress gave judges added flexibility to admit certain kinds of hearsay evidence, while continuing to accept the general principle that hearsay is inadmissible. This statutory structure may not be ignored.

Yet, the Court of Appeals treats the statement of four justices of this Court in *Hamdi v. Rumsfeld*, that hearsay "may need to be accepted as the most reliable available evidence," 542 U.S. at 533-34, as effectively foreclosing any challenge to the use of hearsay evidence in detainee habeas proceedings. App. a11-a12 (citing *Hamdi* and "dispatch[ing]" claim "in short order"); *see also Al-Bihani*, 590 F.3d at 879 (citing *Hamdi* and reasoning that "habeas review for Guantánamo detainees need not match the procedures developed by Congress and the courts specifically for habeas challenges of criminal convictions"). But, the *Hamdi* plurality's statement that hearsay "may" sometimes be "the most reliable evidence" is best understood as an acknowledgment that the district court has discretion to admit affidavits under 28 U.S.C. § 2246. *See* 542 U.S. at 538 ("[A] habeas court in a case such as this may accept affidavit evidence[.]").

To nonetheless view the statement in *Hamdi* as the lower courts have done impermissibly "expand[s] by court decision" the process for modifying the procedural rules outlined in 28 U.S.C. §§ 2073 and 2074. *Cf. Swint v. Chambers County Comm'n*, 514 U.S. 35,

48 (1995) (courts should follow the procedure for changing rules outlined by Congress in the Rules Enabling Act). Subject to congressional approval, this Court could, of course, alter the rules applicable to habeas corpus proceedings through the exercise of its rulemaking power under the Rules Enabling Act, 28 U.S.C. § 2072, *et seq.* It has not done so.

Moreover, the lower courts failed to consider the *Hamdi*'s comment in light of this Court's subsequent decisions. In *Boumediene v. Bush*, 553 U.S. 723 (2008), this Court emphasized that habeas procedures must be sufficient to allow detainees "a meaningful opportunity" to challenge their detention, *id.* at 779, particularly where the underlying administrative hearings designating them "enemy combatants" readily admitted hearsay – thus presenting a "considerable risk of error." In the context of indefinite detention without criminal charge, such procedural deficiencies were simply "too grave to ignore." *Id.* at 785; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 614 (2006) (the challenged military commission violated the Uniform Code of Military Justice and the Geneva Conventions, in part because of the "striking" fact that such commissions "permit the admission of *any* evidence" including "testimonial hearsay and evidence obtained through coercion").

This Court's review is thus necessary to ensure that lower courts do not continue to interpret *Hamdi* as overruling, *sub silentio*, a congressional directive to apply the Federal Rules of Evidence in habeas proceedings, and to guarantee that detainees receive

the "meaningful opportunity" guaranteed by *Boumediene* to challenge their potentially lifetime detention. The writ of certiorari should be granted.

B. The Rules of Evidence are Necessary in This and Other Habeas Proceedings in Order to Ensure that an Individual's Detention is Not Arbitrary and Unlawful

As a practical matter, as well, application of the hearsay rule to habeas proceedings, including detention determinations, is critical. A review of the types of evidence that are admitted in the absence of age-old limits on hearsay evidence reveals the fundamental importance of the hearsay rule to the proper functioning of habeas proceedings.

In one proceeding, for example, the government sought to detain an individual indefinitely based upon interview reports containing the hearsay statements of other detainees which were not only "obtained by torture," but also "contai[ned] second- and third-hand hearsay," and did not "purpor[t] to be verbatim account[s] of what was said." *Ali Ahmed v. Obama*, 613 F.Supp.2d 51, 55 (D.D.C. 2009). In other proceedings the government has offered, for example, intelligence reports "contain[ing] triple hearsay" from an unknown source without any indication of "the circumstances in which the report's source obtained the information," *Abdu Anan v. Obama*, No. 04-1149, unclassified slip op. at 15-16 (D.D.C. Jan. 6, 2010),

statements from an unnamed source contained in a classified document, *Boumediene v. Bush*, No. 04-01166, unclassified slip op. at 10 (D.D.C. Dec. 9, 2008), statements found in a diary of another detainee, *Barhouni v. Obama*, No. 09-5380, unclassified slip op. at 20 (D.C. Cir. June 11, 2010), and the statements of another detainee whose credibility "has been seriously called into question by the Government personnel who have specifically cautioned against relying on his statements," *El Gharani v. Bush*, No. 05-429, unclassified slip op. at 8 (D.D.C. Jan. 14, 2009).[7]

Admission of this type of rank hearsay evidence is not only contrary to the fundamental precepts of our adversarial system of justice, but risks erroneous decisionmaking in cases in which the gravest of infringements on liberty – indefinite detention without

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[7] Deeply unreliable evidence appears to form the core of the government's case in a substantial number of habeas proceedings. For example, Mohammed al-Qahtani, who was subject to extreme interrogation techniques that almost resulted in death, *see* Adam Zagorin, *Inside the Interrogation of Detainee 063*, TIME, June 12, 2005, "[p]rovided detailed information about 30 of Osama Bin Laden's bodyguards who are also held at Guantanamo." U.S. Dep't of Defense News Release, Guantanamo Provides Valuable Intelligence Information, June 12, 2005, *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=8583. *See also* Del Quintin Welber, *Detainee-Informant Poses Quandary for Government*, WASH. POST., Feb. 9, 2009 (reporting that detainee Yasim Muhammed Basardah provided evidence of highly questionable reliability on scores of detainees he claims to have seen at an Al Farooq training camp, in exchange for favorable treatment by the government).

charge – is at stake.[8] Indeed, without the opportunity for cross-examination or, at the very least, use of the adversarial tools afforded under 28 U.S.C. § 2246, in many instances the fact that statements were coerced through torture or abuse will go undetected. Even though some district courts may discount the weight of such hearsay statements in cases where they are manifestly unreliable, *see, e.g., Ali Ahmed*, 613 F.Supp.2d at 57 (determining that inculpatory statements of other detainee recounting overheard conversations at Guantánamo "have little evidentiary value"), they are doing so absent the concrete, comprehensible standards that the Federal Rules of Evidence are designed to ensure.[9] Further, the standards governing hearsay embodied in the Federal Rules of Evidence are themselves informed by a body of case law that properly constrains discretion and promotes consistency, predictability, and fairness in

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[8] The potential for such erroneous decisionmaking is even more pronounced given that the standard of proof in detainee habeas proceedings is the minimal "preponderance of the evidence" standard. *Amicus* NACDL joins the Petitioner in challenging this standard of proof, which is inappropriate and insufficient under these circumstances. *See* Pet. Br. 16-19.

[9] Such an *ad hoc* approach to evaluating the reliability of hearsay on a case-by-case basis was considered and rejected by the Advisory Committee in promulgating the Federal Rules. Even with additional procedural safeguards including notice requirements, the Advisory Committee concluded that this approach "involv[ed] too great a measure of judicial discretion." Advisory Committee's Notes on Art. VIII of the Fed. R. Evid. (citing proposal of Jack B. Weinstein, *The Probative Force of Hearsay*, 46 Iowa L. Rev. 331 (1961)).

applying the Rules. Thus, the *per se* admission of hearsay evidence in habeas cases, and the broad, standardless discretion employed by the district courts to weight such evidence, is at odds with the "vital" role of habeas corpus in guarding "against the arbitrary exercise of governmental power." *Boumediene*, 533 U.S. at 739, 794.

Nor would the application of the Rules of Evidence to these proceedings impose an undue burden on the government. Indeed, many of the hearsay exceptions embodied in the Rules could, as Petitioner highlights, potentially be applicable here. *See* Pet. Br. 14-15 (discussing applicability of exceptions for records of regularly conducted activities, Fed. R. Evid. 803(6), public records, Fed. R. Evid. 803(8), statements against interest, Fed. R. Evid. 804(b)(3), and the residual exception, Fed. R. Evid. 807); *see also Sulayman v. Obama*, No. 05-2386, unclassified slip op. (D.D.C. July 21, 2010) (treating detainee's prior statements as non-hearsay party admissions under Fed. R. Evid. 801(d)(2)). Those exceptions, grounded as they are in the statutorily-recognized reliability of such evidence, or in other legitimate policy justifications, ought to be the subject of appropriate analysis and determination under the Rules of Evidence, as they are in all other cases.

Indeed, there appears to be no limiting principle to the lower courts' decisions. If Rule 1101(e) can be ignored by judicial decree in these Guantánamo

habeas cases, then they can be ignored in other habeas cases as well.[10] If we are to walk away from our age-old tradition of presumptively rejecting the admissibility of hearsay, this momentous step should be taken by Congress, not the courts.

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[10] Nor is any potential concern that national security will be compromised should hearsay be rendered inadmissible a valid one. Leaving aside that such a concern is not embodied in any rule of evidence, courts have shown, in the context of these and other cases, that they are capable of addressing such concerns without undermining their ability to adjudicate cases fairly and accurately. *See* App. a26 (Case Management Order providing for treatment of classified information); *see also Parhat v. Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008) (recognizing that district courts have effective tools to protect "highly sensitive" sources and methods).

CONCLUSION

For the foregoing reasons, *amicus curiae* NACDL respectfully submits that the petition for writ of certiorari should be granted.

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